

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1069 of 1987

Shri Mohuddin Lal Mohamed Siddiqui ..Appellant
(Orig. Deft no.7)

V/s

1. Pandurang Jagannath Thorat
2. Mrs.Dwarkabai Pandurang Thorat
3. M/s Shanti Construction Co.
4. Shanti Gobindram Mohanani
5. Girdharilal Ramchand Ahuja
6. Kishore Gobindram Mohanani
7. Ashok Tobindram Mohanani
8. Prakash Thanna

Appeal dismissed against Appellant

nos.5 and 8 vide orders dated 4/7/97 ..Respondents
(Nos.1 and 2 Orig
Plffs and rest
deft nos. 1 to 6)

AND

First Appeal No.1080 of 1987

1. M/s Shanti Construction Co.
2. Shanti Gobindram Mahanani
- 3.Kishore Gobindram Mohanani
- 4.Ashok Gobindram Mohanani ..Appellants

(Orig.deft nos.

1,2,4 and 5)

V/s

1. Pandurang Jagannath Thorat
2. Mrs.Dwakabai Pandurang Thorat
3. Girdharilal Ramchand Ahuja
4. Prakash Tanna
5. Monuddin LalMohamed Siddiqui .. Respondents

(Orig.defts 3,6 and 7)

Mrs.S.V.Shetty for ShriS.V.Shetty for Appellant

Mr.N.Dinkar Rao for Respondent nos.1 and 2

Mr.Rajesh Shah i/b M/s Vinod Mistry and Co. for
Respondent nos.3,4, 6 and 7

CORAM:S.R.SATHE, J.

DATED:3rd March 2006

ORAL JUDGMENT :-

. Being aggrieved by the judgment and order passed by the City Civil Court in S.C.Suit NO.2035 of 1979 whereby the plaintiffs' suit for specific performance of agreement to sell the suit flat was decreed in plaintiffs' favour and defendant nos.6 and 7 were specifically directed to put plaintiffs in possession of the suit flat, the original defendant no.7 i.e. subsequent purchaser of the suit land has filed the

first appeal No.1069 of 1987 while original defendant nos.1,2,4, and 5 (builders/developers) have filed First Appeal No.1080 of 1987.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiffs and defendants.

. As both the above mentioned appeals are preferred against one and the same judgment the same are being disposed of by this common judgment.

3. The defendant no.1 is a construction company and the defendants nos. 2 to 5 are his partners. By virtue of an agreement dated 2-3-1973 one Gobindram H. Mohnanni agreed to sell lease hold land bearing Survey NO.322/1 situated at Kurla, Greater Bombay to defendant no.1. Accordingly defendant no.1 took the possession of the said land and carried out the construction of building called "Shanti Niketan" on the said land. By agreement dated 14-9-1976 the defendant no.1 agreed to sell flat bearing NO.D-12 situated on 4th floor of Shanti Niketan to plaintiffs. However, thereafter the said agreement was cancelled and fresh agreement was executed on 1-12-1977 whereby instead of D-12 flat bearing No.B-12 situated on 2nd floor of Shanti Niketan was agreed to be sold to the plaintiffs for Rs.28,000/-. The defendant no.1 acknowledged the payment of Rs.22,000/- received from the plaintiff in that agreement and it was further agreed that

plaintiffs should pay Rs.3,000/- to the defendant no.1 on or before 31-12-1977 and balance amount of Rs.3,000/- to be paid at the time of delivery of possession of the suit flat.

4. According to the plaintiffs the plaintiff no.1 contacted defendant no.2 for making payment of Rs.3,000/-. However, at that time he was told that construction of the building would not be complete by 31-3-1978 and as such plaintiffs should make the payment of Rs.6,000/- at the time of delivery of possession. Thereafter the construction of the building was over by December 1978. However, the defendants did not deliver the possession to plaintiffs. Hence on 23-1-1979 plaintiffs issued notice to the defendant no.1 and called upon him to deliver the possession of the suit flat to them. They also annexed cheque of Rs.6,000/- and other amount which was towards some other charges to plaintiffs. In spite of the receipt of notice the defendant nos.1 to 5 did not give any reply immediately but on 19-2-1979 the defendants 1 to 5 replied the plaintiffs notice and returned the cheques sent by the defendants. The defendants informed the plaintiffs that they have terminated the agreement dated 1-12-1977. Thereafter the plaintiffs came to know that defendant nos.1 to 5 sold the suit flat to defendant no.6 with a view to defeat the plaintiffs' claim and this defendant no.6 sold the said flat to the defendant no.7. According to

the plaintiffs the said transaction with defendant nos 6 and 7 were bogus and illegal. Hence plaintiffs filed Short Cause Suit No.2033 of 1977 for specific performance of the agreement to sale of the suit flat.

5. The defendant nos.1 to 4 and 5 filed joint written statement at Exh.6 and admitted the execution of the agreement dated 1-12-1977 and receipt of amount of Rs.22,000/- under agreement. The defendants further contended that plaintiff no.1. had not at all contacted to defendant (in December 1977) as alleged by him and on the contrary the plaintiffs had failed to keep their promises and to make payment of Rs.3,000/- as agreed under the agreement, by the end of 31-12-1977. According to them by virtue of this stipulation in the agreement time to make payment of Rs.3,000/- was essence of the contract and as per stipulation in the said agreement the defendants had right to terminate the agreement on plaintiff's default in making payment. So, accordingly they issued notice dated 19-2-1979 and terminated the agreement. The defendants therefore contended that the plaintiffs are not entitled for specific performance of the agreement to sell. They also contended that as the agreement with plaintiffs was terminated they were entitled to sell the said flat to other person and accordingly they sold it to the defendant no.6 who in turn sold the same to the defendant no.7. The defendants also took contention that the suit is not properly valued. On

this and other grounds the defendant applied for dismissal of the suit.

6. The defendant no.6 filed his written statement and contended that there was no cause of action to file the suit against him. He also contended that the suit is not properly valued. He further contended that he was bonafide purchaser for value without notice. He was not at all aware about the agreement between the plaintiff and defendant nos.1 to 5. He therefore purchased the suit flat and then sold it to defendant no.7 for Rs.45,000/- and defendant no.7 was also put in possession. He denied plaintiff's allegation that transfer of the suit flat to him and then subsequent transfer to defendant no.7 is bogus and illegal. Hence on all these grounds he prayed for dismissal of the said suit.

7. The defendant no.7 also filed written statement and took similar contentions. According to him he purchased the suit flat for Rs.45,000/- and he was not aware about the agreement between the plaintiffs and defendant nos.1 to 5. Thus according to him he is a bonafide purchaser for value without notice and as such plaintiff is not entitled for specific performance of an agreement. Hence on all these grounds defendant no.7 prayed for dismissal the suit.

8. On these pleadings the learned trial Judge framed

issues. In order to prove the suit claim on behalf of the plaintiffs, plaintiff no.1 Pandurang Thorat examined himself and produced certain documents. As against this on behalf of defendant nos 1 to 5, defendant no.5 was examined. The defendant no.6 did not adduced any evidence. Defendant no.7 examined himself and produced an agreement executed between him with defendant no.6.

9. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that the plaintiffs were ready and willing to perform their part of the contract. However, the defendants 1, 2, 4 and 5 illegally revoked the agreement to sell and refund to execute the sale deed and put the plaintiffs in possession of the suit flat. The trial Court also held that the defendant no.7 is not bonafide purchaser for value without notice. The trial Court negatived the defendants contention that suit is not properly valued and proper court fee has not been paid. He therefore decreed the suit in plaintiffs' favour and directed the plaintiffs to deposit amount of Rs.6,600/- within a particular period and defendants were directed to specifically perform the agreement to sell dated 1-12-1977 within a particular period. The above mentioned order is challenged by the defendants in the present appeals.

10. In these appeals before me Mrs Shetye, learned

Advocate for the defendant no.7 has urged only two points. Firstly, she submitted that the learned trial Judge has not properly appreciated the evidence on record and has wrongly held that defendant no.7 is not a bonafide purchaser for value without notice. According to her there is sufficient evidence to show that the defendant no.7 is a bonafide purchaser for value without notice and as such plaintiffs cannot claim possession of the suit flat from defendant no.7. Secondly, she canvassed before me that the alleged agreement between plaintiffs and defendant nos 1 to 5 is in fact terminated by the defendants 1 to 5 and as such there is no question of granting specific performance of such agreement. She therefore prayed that the appeal be allowed and decree passed by the trial Court be set aside.

11. Similarly Shri Rajesh Shah, learned Advocate for defendant nos.1 to 5 has also urged two points before me. Firstly, he submitted that time was essence of the contract and plaintiffs were bound to make payment of Rs.3,000/- by the end of 31-12-1977 but admittedly such payment has not been made by them and as such plaintiffs are not entitled to seek any relief. Secondly, he canvassed before me that as a result of default committed by the plaintiffs the defendants were entitled to terminate the agreement to sell and particularly there is valid termination of the said agreement. So, the plaintiffs are not entitled for

decree for specific performance of the said agreement. He also submitted that as per stipulation in the agreement, after termination of the agreement the defendants 1 to 5 were entitled to sell the property to other person and accordingly they have sold it to the defendant no.6 who in turn sold the same to the defendant no.7. The defendant nos. 6 and 7 are bonafide purchasers for value without notice. He, therefore, submitted that the appeal be allowed and decree for specific performance passed in favour of the plaintiffs be set aside and plaintiffs suit be dismissed. 12. As against this Shri Dinkar Rao learned advocate for plaintiff supported the judgment and order passed by the learned trial Judge.

13. It is not in dispute that on 1-12-1977 agreement was executed between plaintiffs and defendant nos.1 to 5 to sell the suit flat to the plaintiffs for Rs.28,000/- and defendant no.1 received an amount of Rs.22,000/- towards the consideration. The amount of Rs.3,000/- was to be paid on 31-12-1977 and balance sum of Rs.3,000/- was to be paid by the plaintiffs to defendant no.1 at the time of delivery of possession. It is also an admitted fact that plaintiffs did not pay the amount of Rs.3,000/- on 31-12-1977 as agreed in the said agreement. It is the case of the plaintiffs that they were ready and willing to pay the said amount, not only that but plaintiff no.1 had gone to the defendants for that purpose but the defendant no.2 told him that

it would not be possible to hand over the possession of the suit flat till 31-3-1978 as agreed and as such the plaintiffs should make payment of Rs.6,000/- while handing over possession. Of course, the defendant nos.1 to 5 have denied this. According to them the plaintiffs never approached for making payment of Rs.3,000/-. On the contrary they committed default. They did not pay, even when, demand was made to that effect and as a result of the same they terminated the agreement in question, as the time was essence of the contract. The first point which shall have to be decided in this appeal is whether amount of Rs.3,000/- was not paid by the plaintiff on 31-12-1977 because the defendant no.2 had told him that the payment be made later as the construction was not likely to be finished on 31-3-1978. While considering this aspect it must be noted that in plaint the plaintiffs has specifically averred that he had a talk with defendant no.2 in this behalf and as per his statement he did not pay the amount of Rs.3,000/- by the end of 31-12-1977. However, if we see the deposition of the plaintiff then it appears that he has not stated that he had a talk with defendant no.2 in this behalf. On the contrary, he has stated that he had a talk with said defendants and not with other defendants. So, whatever was pleaded was not proved by plaintiff in this behalf and whatever was stated in evidence was not pleaded by him. The learned trial Court, therefore, did not accept the plaintiffs' case that in December 1977 plaintiff no.1

had met defendant no.2 and as defendant no.2 told him that payment should be made at the time of delivery of possession he did not pay the amount of Rs.3,000/- to the defendants. It is true that in letter dated 23-1-1979 plaintiffs had not mentioned that when they contacted the defendant no.2, defendant no.2 told that balance amount of Rs.6,000/- can be paid at the time of delivery of possession. However, that by itself is not sufficient to jump to the conclusion that no such incident had taken place. While writing the said letter plaintiffs might have not felt it necessary to make mention of the said fact. So, that by itself is not sufficient to jump to the conclusion that the stand taken by the plaintiffs that on 31-3-1977 he did not make the payment because defendant had told him accordingly is not true and correct. There is some mistake on the part of plaintiff to name the defendant to whom he had met. If really there would have been willful default on the part of plaintiff the defendants would have immediately called upon plaintiff to pay the balance amount as they had done earlier. However, admittedly they have not done so. On the contrary they kept mum till the receipt of notice of plaintiff. So the case of plaintiff that because of the say of defendant he did not pay balance of Rs.3,000/- on 31-12-1977 appears to be correct and probable. The question arises whether because of this non payment of amount of Rs.3,000/- on 31-12-1977 one can jump to the conclusion that the plaintiffs were not ready and

willing to perform their part of the contract.

14. Shri Shah, learned Advocate for the defendant nos.1 to 5 submitted that time was essence of the contract in the instant case. For that purpose, he has drawn my attention to the clause no.12 of the agreement dated 1-12-1977. It runs as under :-

...."If any of the flat/garage owner fails to pay or commits default in payments of arrears or any of the instalments as aforesaid, on the respective due dates time being of the essence of the contract the promoters will be entitled to terminate this agreement and forfeit the deposit and all other amounts previously paid by the said defaulting flat/garage owner, who shall lose all right on the flat/garage owner, agreed to be taken by him/her. On the promoters termination this agreement under this clause, they shall be at liberty to sell of the said flat/garage to any other person as the promoters may deem fit at such price as the Promoters may determine and the flat owner shall not be entitled to question such sale or to claim any amount whatsoever from the promoters."

15. It is true that in this clause it is mentioned that on the respective due dates time being the essence of the contract promoter will be entitled to terminate this agreement and forfeit the deposit and all other

amounts previously paid by the said defaulting flat owners. However, merely because it is mentioned that time is essence of the agreement one cannot jump to the conclusion that, in fact it was so and parties have treated it accordingly. In which circumstances the time is to be treated as essence of the contract has been specifically observed in the case of **Jamshet Khadaram A.I.R. 1915 Privy Council page 83**

"Contract Act - S.55 does not lay down any principle which differs from those which obtain under the Law of England as regards contracts to sell land. Under that law, equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But such stipulation must show that the intention was to make the rights of the parties depends on the observance of the time limits

prescribed in a fashion which is unmistakable. The language will have this effect, if it plainly excludes that motion that those time limits were of merely secondary importance in the bargain and that to disregard them, would be to disregard nothing that lay as its foundation. Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties and it will join specific performance notwithstanding that from the point of view of Court of law the contract has not been literally performed by the Plaintiff as regards the time limit specified. But equity will not assist where there has been undue delay on the part of one party to the contract and the other has given him unreasonable notice, that he must complete within a definite time, Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract.

16. Shri Shah, learned Advocate for the defendants has led his hands on a case N.S.Vidyanadan V/s Vairavan AIR 1997 SC 1751. However, in my opinion this authority in

fact have supported the defendants case because it is mentioned in this ruling that merely because certain time limit is prescribed for taking steps by one or the other party it may not amount to making time the essence of contract but it must have some significance. It is mentioned in this authority that when such stipulation is there it cannot be ignored altogether by the Court. It is further observed that it has been consistently held by the court in India. that in the case of agreement of sale relating to immovable property time is not the essence of contract unless specifically provided to that effect. It is true that in the present agreement there is mention that payment of due deposits is essence of the contract. However, at the same time if we read other clauses of the said agreement and actual process of making payment then it does appear that payment on the specific date mentioned in the agreement was not to be treated and has not been actually treated as essence of the contract. It is mentioned in the agreement that the builder/promoter to give notice to the flat owners calling upon to make payment and flat owner is suppose to make payment accordingly within 7 days on receipt of such notice. It may be argued that this stipulation is applicable only in respect of payments which are to be paid against completion of particular work and not in respect of other. However, it is pertinent to note that so far as last payment of Rs.3,000/- is concerned, it was to be made against delivery of possession and no

specific date is mentioned about the delivery of possession. Admittedly though as per agreement possession was to be handed over on 31-3-1978, the same was not handed over as building was not complete on that date and it was completed only in September 1978. When such is the position one cannot jump to the conclusion that failure on the part of the plaintiffs to pay amount of Rs.3,000/- on 31-12-1977 disentitled him to lay his claim over the flat in question, particularly when we find that the had already made substantial payment of Rs.22,000/- out of total consideration of Rs.28,000/-.

17. There is another important point which would also go to show that time was not essence of the contract and the parties to the agreement had also never treated time as essence of the contract. The defendant no.5 has clearly admitted in his cross examination that previously when payment was due from the plaintiffs defendants had sent notices calling upon them to pay dues and that was even after the expiry of due date. Such notices are produced on record at Exhs.4 and 5. So this would also go to the show that time was not essence of the contract.

18. It is pertinent to note that if really time would have been essence of the contract and there was default on the part of the plaintiffs in making payment on 31-12-1997 and plaintiff had an intention to cancel the

agreement then normally he would have issued notice regarding cancellation of the agreement immediately after 31-12-1977 but that has not happened. On the contrary, it was plaintiffs who first issued notice dated 23-1-1979 to the defendants along with cheque of Rs.6,000/- and called upon them to hand over the possession and after receipt of the said notice on 19-2-1979 i.e. also after about 3 weeks from the plaintiffs' notice the defendants sent reply and terminated plaintiffs' agreement. So, here is a case where we find that builder/developer had in fact not completed the construction and as agreed was not in a position to hand over possession on 31-3-1978. Plaintiffs offered entire balance consideration immediately after completion of the building and it is only thereafter the defendants issued notice of termination of agreement. So, this conduct on the part of the defendants also negatives the contents of defendant that time was essence of the contract. So, under such circumstances merely because it is mentioned in the agreement that on plaintiff's default the builder would be entitled to cancel the agreement, it cannot be held that termination of the agreement in question was just, proper and legal.

19. It has come on record that price of the suit property was increased by the time plaintiff sent letter dated 23-1-1979. So with a view to gain more profit defendants took advantage of the fact that the

plaintiffs had not made the payment of Rs.3000/- on 31-12-1977 and decided to sell the property to defendant no.6.

20. Once it is held that defendants action to terminate the agreement was not legal and warranted at the relevant time then naturally their further conduct of disposing of the said property in favour of defendant no.6 is also not legal and correct.

21. Though defendants nos. 6 and 7 have contended that they are bonafide purchasers for value without notice it must be noted that defendant no.6 has not at all adduced any evidence in support of his contention. It is needless to say that burden was on defendant no.6 to prove that he was bonafide purchaser for value without notice. But he did not adduce any evidence to discharge the said burden. Naturally, it is difficult to believe that defendant no.7 who has purchased the property through defendant no.6 is bonafide purchaser for value without notice. If really the defendant no.7 wanted to take such contention he ought to have examined defendant no.6 to show that he was also not aware of the transaction between plaintiffs and defendant nos.1 to 5, but he has not done so. Merely because defendant no.7 has stated that before purchase of the property he asked builder whether he was having any objection and as he replied in the negative he purchased the property it cannot be said that he is

bonafide purchaser. It is pertinent to note that defendant no.6 has purchased the property for amount of Rs.40,000/- and within 2 months he sold the said property to the defendant no.7 for Rs.45,000/-. Interestingly it is the case of the defendant no.7 that entire consideration of Rs.45,000/- was paid in cash. There is absolutely nothing on record to show as to why such big amount was paid in cash and not by cheque. It is not even shown that at the relevant time defendant no.7 was in fact having such amount. So, this transaction also creates some doubt. Apart from it, if we consider the fact that defendant no.6 sold the property within 2 months and there is nothing on record to indicate as to what induced him to dispose of the property within 2 months, it suggests that having realised the fact that there was a prior agreement between plaintiffs and defendant nos.1 to 5 and defendant no.6 was not bonafide purchaser he must have decided to dispose of the same.

22. Mr.Rajesh Shah, learned Advocate for the defendant no.7 submitted that in the instant case once the defendant no.7 has said from the witness box that he has paid consideration and made enquiry with the builder as to whether he was having any objection, it must be held that defendant no.7 has discharged his burden properly and is a bonafide purchaser for value without notice. For this proposition she has placed reliance on various cases such as :- i) AIR 1929 Lahore

P 249 (D.B. Lekh Singh V/s Dwarkanath and Anr. ii) AIR 1957 Patna -284 Ramchandra Singh V/s Bibi Asgharai Begam and Anr. iii) AIR 1961 Orissa 129 Dadi Dalai V/s Balaendab Sathpathy.

23. I have carefully gone through all these authorities. In all these authorities it has been held that when subsequent purchaser takes the contention that he is bonafide purchaser for value without notice, the burden is on him to prove the same and such burden is ordinarily discharged by a denial and by a negative evidence. However, in the instant case defendant no.7 is not the direct purchaser from the defendant nos.1 to 5 but he has purchased the said property through defendant no.6. So, it was first necessary for him to show that defendant no.6 was a bonafide purchaser for value without notice. But that has not been established. So, having regard to all these facts and circumstances I am not inclined to hold that defendant no.7 is bonafide purchaser for value without notice. He had not made any thorough enquiry about the title and other aspects prior to the purchase of the property. In fact the purchase itself appears to be doubtful.

24. From the above discussion it is very clear that in the instant case the plaintiffs had made substantial payment of Rs.22,000/- out of total consideration of Rs.28,000/-. The building was not completed by the

builder as agreed. Ultimately plaintiffs on their own issued a notice to the defendants and also sent balance amount of Rs.6,000/- by cheque. So, plaintiffs were ready and willing to perform their part of the contract. It is difficult to believe that the purchaser who had already paid Rs.22,000/- would not be ready and willing to pay balance amount of rs.6,000/- particularly when we find that when construction of the building was over, plaintiff no.1 purchased has actually tendered the said amount to defendants builder. So, considering all these aspects I think that order passed by the learned trial Court is legal and correct. It is true that asking a party to complete the specific performance of the agreement which is executed before 30 years is some what awkward but we have to take into consideration the fact that all these years have lapsed in litigation. It is not a case where the plaintiffs have approached the court after lapse of considerable time. On the contrary the plaintiffs filed the suit for specific performance immediately when defendants refused the contract. When such is the position merely because now 30 years have lapsed one cannot reject the decree for specific performance. The legitimate right of plaintiffs cannot be denied merely because of lapse of long period particularly when plaintiff is not responsible for the same. The judgment of the trial Court is legal and correct. Hence both the appeals are dismissed with costs.

25. The plaintiffs to deposit amount of Rs.7600/- as directed by the trial Court in the trial court for payment to the defendant nos.1 to 5 on or before 31-3-2005 and thereafter on or before 30-4-2006 the defendants nos.1 to 5 to specifically perform the agreement dated 1-12-1977 and defendants nos. 6 and 7 to put the plaintiffs in possession of the suit flat on or before 30th April 2006.

(S.R.SATHE, J.)